UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUIS SOTO PADILLA, Appellant, vs. THOMAS C. LYNCH, Attorney General of the State of California, JOHN DOE, Chairman of the Adult Authority, ARTHUR L. OLIVER, Warden of Folsom State Penitentiary, Appellees.	)	No. 21924

APPELLEES' BRIEF

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JURISDICTION

The jurisdiction of this Court is conferred by Title 28, United States Code sections 1215 and 1291 which make a final order in a federal District Court reviewable in the Court of Appeals.

STATEMENT OF THE CASE
AND OF THE FACTS

On December 5, 1966, appellant filed a Complaint in the United States District Court for the Northern District of California alleging that appellees had denied him his civil rights. Appellant's Complaint in essence stated that he had been subjected to arbitrary and invidious

discrimination by the California Adult Authority and that as a result had been subjected to greater and different punishment than others in similar circumstances. Appellant asserted that he and a codefendant were convicted of the same crime (possession of narcotics), that the codefendant was paroled in 1963, that the Adult Authority has refused to release appellant on parole and that, therefore, appellant has been deprived of equal protection under the law. Appellant also asserted that the Adult Authority has not released him on parole because of his refusal to act as an investigator or informer for the Department of Corrections and for the California Attorney General. The Complaint prayed for 1) a declaratory judgment that appellant be paroled or shown cause why such parole was denied him; 2) a declaratory judgment directing the Adult Authority to recognize appellant's rights and privileges under the due process clause of the Fourteenth Amendment to the United States Constitution; 3) a permanent injunction against the California Adult Authority and the California Department of Corrections from further deprivation of his liberty in an unconstitutional manner.

On January 27, 1967, appellees filed a Notice of Motion and Motion to Dismiss and Points and Authorities in Support of Motion to Dismiss. On February 7, 1967, appellant filed a Motion in Opposition to the Motion to

Dismiss.

On May 4, 1967, Judge Oliver J. Carter of the United States District Court filed his order granting appellees' Motion to Dismiss.

Appellant filed his Notice of Appeal together with a Motion to Proceed in Forma Pauperis under Title 28, United States Code section 1915, on April 27, 1967. Appellant's request to proceed in forma pauperis was granted by the District Court on May 4, 1967.

SUMMARY OF APPELLEES' ARGUMENT

The Complaint does not state a cause of action.

A. Appellant's allegation that he is being denied parole is not an allegation of a violation of rights under the Constitution or Statutes of the United States.

B. Defendant officials are immune from civil liability.

ARGUMENT

I

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION

A. Appellant's allegation that he is being denied parole is not an allegation of a violation of rights under the Constitution or Statutes of the United States.

In his Complaint, appellant alleged that he has been denied parole for seven and one-half years whereas

his codefendant convicted of the same crime was released on parole after only three and one-half years, and, therefore, he has been denied equal protection of the laws. Obviously, the decision as to when a prisoner is a fit subject to be released on parole is a determination that must be made as a result of the facts and circumstances concerning each prisoner. The mere fact that a codefendant was released at an earlier date does not, in and of itself, establish that there has been a denial of equal protection of the laws. In Washington v. Hagan, 287 F.2d 332 (3rd Cir. 1960), cert.denied 366 U.S. 970 (1961), the Court stated at page 334:

> "[T]his matter of whether a prisoner is a good risk for release on parole or has shown himself not to be a good risk, is a disciplinary matter which by its very nature should be left in the hands of those charged with the responsibility for deciding the question. . . .
> "[T]he problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business."

Appellant also alleges in his brief that the Adult Authority has failed to determine or redetermine

the length of his imprisonment. However, it is fundamental to the California law regarding sentence and parole that every sentence is for the maximum unless and until the Adult Authority acts to fix a shorter sentence. In re Smith, 33 Cal.2d 797, 804 (1949). The Adult Authority may act just as validly, as was done in this case, by considering the case and then declining to reduce the term and denying parole. In re Mills, 55 Cal.2d 646 (1961).

The administration of parole is an integral part of criminal justice having as its objective the rehabilitation of those convicted of crime and as its further objective the protection of the community. Ex parte Tenner, 20 Cal.2d 670 (1942). Parole, however, is not a matter of right but a matter of grace. In re Harris, 80 Cal.App.2d 173 (1947); Gibson v. Markley, 205 F.Supp. 742, 743 (S.D. Ind. 1962); Martin v. United States Board of Parole, 199 F.Supp. 542, 543 (D.C. Cir. 1961); Lopez v. Madigan, 174 F.Supp. 919 (N.D. Cal. 1959). Parole, therefore, is a statutory privilege and not a matter of constitutional significance. Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Jones v. Cunningham, 371 U.S. 236, 242 (1963). Appellant's allegation that he is being denied parole is therefore not an allegation of a violation of rights guaranteed him under the Constitution or

Statutes of the United States. Therefore, he has failed to state a cause of action under Titles 28 or 42, United States Code sections 1331, 1343, 1392, 1979 and 1983. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), cert.denied 376 U.S. 920 (1964); In re Costello, 262 F.2d 214 (9th Cir. 1958); Dreyer v. Illinois, 187 U.S. 71 (1902); Cox v. Maxwell, 366 F.2d 765 (6th Cir. 1966).

B. Defendant officials are immune from civil liability.

Appellant is attempting to sue the Chairman of the Adult Authority, the Warden of the prison, and the California Attorney General for their failure to grant appellant a parole. It is appellees' position that said officials are immune from civil liability arising out of the authorized performance of official discretionary functions. Recognition of immunity for federal officials performing authorized quasi-judicial acts in the course of their official duty had its origin in the ancient principle that judges are absolutely immune from civil defamation or libel suits arising out of judicial proceedings. See dissenting opinion of Mr. Chief Justice Warren in Barr v. Matteo, 360 U.S. 564, 579 (1959). This protection from unwarranted harassment was first extended by the Supreme Court to heads of federal

executive departments, Spalding v. Vilas, 161 U.S. 483 (1896), and then to authorized statements of lesser officials, Barr v. Matteo, supra. In the latter case, the majority opinion described the underlying policy as follows:

> "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.
>
> * * * [W]e cannot say these functions become less important because they are exercised by officers of lower rank in the executive hierarchy." Barr v. Matteo, supra at 572-73.

Lower federal courts have not hesitated to expand both the scope and the nature of the immunity. See Preble v. Johnson, 275 F.2d 275 (10th Cir. 1960) (director of maintenance control program at a naval training center); Gamage v. Peal, 217 F.Supp. 384 (N.D. Cal. 1962) (Air Force medical officers and contract psychiatrist immune from action for damages). In Lang v. Wood, 92 F.2d 211, cert.denied 302 U.S. 686 (D.C. Cir. 1937), plaintiff prisoner filed an action for damages alleging that defendant Attorney General, Parole Board members, the Warden of the prison, and others maliciously and arbitrarily revoked his parole. The Court there held:

"[T]he hearing of the revocation of plaintiff's parole in the present case was a subject matter committed by law to the executive control of the defendants as public officers, and in such case error on their part does not expose them to an action for damages, and this is none the less true even though their error be described as arbitrary, capricious, and malicious. See Spalding v. Vilas, 161 U.S. 483, 498 (1896)."

Lang v. Wood, supra at 212.

It is, therefore, submitted that appellees as public officers had absolute immunity for acts done by them in relation to matters committed by law to their supervision.

Finally, appellees submit that a complaint for injunctive relief under the Civil Rights Act by appellant at this time is premature. The basis for appellant's prayer for injunctive relief is alleged illegal confinement in a state prison. The proper and readily available remedy is state and federal habeas corpus. Van Buskirk v. Wilkinson, 216 F.2d 735 (9th Cir. 1954); Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963); Davis v. State of Maryland, 248 F.Supp. 951 (D. Md. 1965). A suit for an injunction under the Civil Rights Act may not be used in place of a petition for a writ of habeas corpus to avoid the requirements laid down by the Supreme Court as well as by this Court, that State prisoners exhaust all available State remedies

before applying to Federal Courts for release from their imprisonment. Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court dismissing the Complaint should be affirmed.

Dated: September 22, 1967.

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of the State of California

EDWARD P. O'BRIEN,
Deputy Attorney General

Attorneys for Appellees

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66-1919

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: September 22, 1967.

EDWARD P. O'BRIEN
Deputy Attorney General